

Award No. 9554
Docket No. MW-8780

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement of August 21, 1954 when it failed to give its reasons for disallowing the claim covered by its file BMW 7-55, in compliance with Section 1(a) of Article V of said Agreement;

(2) The Carrier further violated the aforesaid rule provision when it refused to allow the aforesaid claim because of the violation referred to in part one (1) of this claim;

(3) The Carrier be required to allow the claim as presented under date of March 31, 1955, account of the above referred-to violations.

EMPLOYEES' STATEMENT OF FACTS: Under date of March 31, 1955, the Employees' Assistant General Chairman addressed the following letter to the Carrier's Assistant Division Engineer:

"Longview, Texas, March 31, 1955

Mr. A. K. McKeithan
Assistant Division Engineer
Missouri Pacific Lines
DeQuincy, Louisiana

Dear Sir:

The following B&B employes are claiming 64 hours on March 18th, 64 hours, March 21st, 64 hours, March 22nd, and 32 hours, March 24th, 1955, account Section Gang No. 29½ installing road-way crossing plants at Mile Post 610, pole 3, Krotz Springs, Louisi-

recognized as belonging to and coming under the jurisdiction of the Maintenance of Way Department." (See Rule 1.)

In Award 7050 your Board said:

"Although titles are an uncertain guide to what the actual duties of a position are, some types of work clearly fall under an occupational title according to ordinary, common understanding."

As your Board recognized in Award 7050, the "ordinary, common understanding" with respect to the installation of crossing planks is that such work, which is in fact a part of track work, properly falls within the category of duties to be performed by employes in the Road Track Department.

It is the position of Carrier that the work here involved does not belong exclusively to Bridge and Building Department employes as contended by the Employes, and since it has been shown that track forces have always performed this work with no determined effort on the part of the Organization to change the practice until this case (and the other four cases resting on it) arose, the practice which has heretofore obtained should be controlling. See Awards 3727, 4922, 4559.

Furthermore, there is no rule in the governing agreement to support the Employes' contention and claim. Therefore, as your Board ruled in Award 7050, the Employes' claim in this case should likewise be denied.

The substance of matters contained herein has been the subject of discussion in conference and/or correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: It is not disputed that the Carrier declined the claim and provided Claimant with its decision in writing with an explanation of the reasons for the denial at all levels but the last before appeal to this Board. At that stage the claim was declined in writing the day after the conference on it, but without including a statement in writing of the reasons for the declination.

This lapse is claimed to be such a violation of Article V 1(a) of the National Agreement of August 21, 1954 as to warrant sustaining the underlying claim without regard to its merits.

Article V 1(a), the well-known time limit rule, requires that claims be processed in the specified manner on the Carriers' properties and includes a requirement for written disallowance of claims accompanied by a written statement of the "reasons for disallowance."

Carrier has argued, *inter alia*, that the Claimant and Organization are without standing to assert the violation of Article V 1(a) because they failed to abide by the requirement of Article V 1(b) to notify the Carrier representatives who disallowed the claim "in writing . . . of the rejection of his decision."

This contention was perhaps put into issue in the Carrier's Ex Parte Statement; but the ground was not very clearly stated at that point.

The Organization responded in its Oral Argument that the Carrier's contention that the Claimant had not acted in accordance with Article V 1(b) was not specific and no such showing could be made.

Thereafter the Carrier did not press the Article V 1(b) objection; throughout the docket it sought a determination on the merits of the underlying dispute.

On panel argument, the Carrier brief contended that the record showed that the Claimant and Organization had failed to make the rejections in writing required by Article V 1(b), citing the exchange of correspondence in the record. That correspondence consists of the claim letters, disallowance letters and appeals. There are no copies of letters of rejection of the disallowances.

The Employes' brief on panel argument stressed the alleged violation of Article V 1(a) and commented on Article V 1(b) in regard to the last round of correspondence only and on a point different from the one now discussed.

After the panel argument and consideration of the briefs the referee had the impression that the Carrier's contention that there had been a failure to file letters of rejection was supported by the record and not seriously denied by the Organization.

A draft Award based upon this view was circulated; the Organization requested reargument. On reargument the Organization strenuously contended that the absence of rejection letters from the record is not proof that they were not filed. The Carrier's specific allegation of the failure to file was denied and an offer was made of letters rejecting the disallowance rulings. We do not base any conclusions upon the offered proof.

After reargument, we are persuaded that the absence of rejection letters is not proof of their non-existence. The Organization asserted the violation of Article V 1(a). The Carrier asserted by way of defense that the Claimant and the Organization failed to fulfill the conditions (timely letters of rejection of disallowance rulings) of Article V 1(b). Originally the referee had the impression that the Employes did not seriously contest this allegation that the rejection letters were not written. The reargument makes it clear that the Employes emphatically deny the accuracy of the asserted defense.

In this posture it becomes incumbent upon the Carrier to provide record evidence that letters rejecting the disallowance rulings were not filed. The record contains no such evidence. The mere absence of such letters is not the equivalent of proof of the defense.

The question remaining is whether the failure to include a statement of reasons for disallowance in a timely letter disallowing the claim is such a violation of Article V, Section 1(a) and (c) as to warrant sustaining the underlying claim without a consideration of its merits.

In this case it is clear that the required notices and reasons were given at all but one stage of the grievance procedure. Were this an original proposition we would hold that there had been substantial compliance with the rule which served the purposes for which it was drafted.

However, this is not an original proposition before this Division. In cases we find indistinguishable in principle sustaining awards were made. **Award 9205** (Stone) and **Award 9253** (Weston); semblo **Award 9492** (Rose).

In sustaining the claim we wish to make it clear that we have not considered it on its merits.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of September, 1960.